Supreme Court, U. S.
FILED
APR 15 1980
RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1383

RICHARD A. GANT, *et al.*,

Petitioners,

vs.

UNION BANK, *et al.*,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

MITCHELL L. LATHROP
BRIAN G. GOUCH
LAWRENCE D. STECKMEST
JEFFREY C. BERSIN
MacDONALD, HALSTED & LAYBOURNE
1200 Wilshire Boulevard
Suite 600
Los Angeles, Calif. 90017
(213) 481-1200

MILTON FREDMAN
FREDMAN, SILVERBERG, & LEWIS, INC.
3252 Fifth Avenue
San Diego, Calif. 92103
(714) 291-3434

ASA ROUNTREE
STEPHEN C. MUTHER
DEBEVOISE, PLIMPTON, LYONS & GATES
299 Park Avenue
New York, New York 10017
(212) 752-6400

ROBERT J. BROWN
BONER, BROWN, DEUTSCH & MANN
Central Federal Tower
225 Broadway, Suite 900
San Diego, Calif. 92101
(714) 233-0600
Of Counsel

Counsel for Petitioners

April 15, 1980

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

I. Page

Settlements Have Not Reduced the Factual and Legal Complexity of the Consolidated Cases 2

II.

Only This Court Can Resolve the Inevitable Conflict in the Circuit Courts Concerning Whether the Third Prong of the Ross Test May Be Employed to Resolve the Jury Question 3

III.

This Court Has Recognized the Appropriateness of Review of an Interlocutory Order Such as That Now Presented 5

Conclusion 6

TABLE OF AUTHORITIES CITED

Cases

Beacon Theatres v. Westover, 359 U.S. 500 (1959) .. 5

Colonial Ventures, Inc. v. Brown, Wood, Fuller, Caldwell & Ivey, Civil No. 77-454-T (S.D. Cal.) 2, 3

Colonial Ventures, Inc. v. Touche Ross & Co., Civil No. 74-436-T (S.D. Cal.) 2, 3

First National Bank of Toledo v. U.S. Financial, Inc., Civil No. 74-286-T (S.D. Cal.) 2

Ross v. Bernhard, 396 U.S. 531 (1970) 3, 4, 5

Timreck v. United States, 577 F.2d 372 (6th Cir. 1978), rev'd on other grounds, ... U.S. ..., 60 L.Ed.2d 634 (1979) 4

United States v. Olivares-Vega, 495 U.S. 827 (2d Cir.), cert denied, 419 U.S. 1020 (1974) 4

Ward v. Village of Monroeville, 409 U.S. 57 (1972) . 6

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1383

RICHARD A. GANT, *et al.*,

Petitioners,

vs.

UNION BANK, *et al.*,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

The Respondents do not seriously contest the importance of the question presented by the Petition. In fact, Respondent Touche Ross & Co. candidly recognizes "the importance of this issue and fully anticipates that it will be resolved by this Court in the near future." Memorandum in Opposition of Touche Ross & Co. at 1. Rather, Respondents argue that: (i) settlements have substantially reduced the complexity of the consolidated actions, (ii) no conflict exists among the courts of appeals and (iii) the question presented is premature and may later be mooted. Those arguments misconstrue the facts of the case and the applicable law and present no basis for denying the Petition.

I.

Settlements Have Not Reduced the Factual and Legal Complexity of the Consolidated Cases.

Respondents argue that numerous settlements have occurred since oral argument before the court of appeals below and that those settlements have substantially reduced the complexity of the consolidated cases. *See* Memorandum in Opposition of Touche Ross & Co. at 2-3; Opposition of Charles D. Prutzman, Jr. at 2-3, 5-6; Brief in Opposition of Colonial Growth Shares, Inc. at 1-2, 4. This is not so.

The only active case which has been settled since oral argument is *First National Bank of Toledo v. U.S. Financial, Inc.*, Civil No. 74-286-T (S.D. Cal.). Thus, the consolidated cases are now in a posture substantially similar to that which existed with the Court of Appeals below.[1]

But even if, as suggested by Touche Ross, the *Societe Generale* cases are about to be settled,[2] the complexity of the two remaining *Colonial* cases[3] will not be substantially reduced. In those two cases, as in the other cases, whether considered separately or alone, the essence of the litigation is the alleged misrepresentations concerning the financial condition of United States Financial, Inc. (''USF''). The determination of the truth of these allegations turns, in the *Colonial* cases, as in the other cases, on an analysis of the extraordinarily complicated commercial and real estate transactions engaged in by USF over a seven-year period and the accounting treatment accorded those transactions. Settlement of the other cases does not reduce the technicality or complexity of the underlying financial and accounting questions. The fact finder in the *Colonial* cases will still have to analyze all of the USF accounts, listen to expert testimony as to which accounting principles were or should have been employed, study the financial transactions, and examine the supporting documentation. The trial will last just as long, the witnesses will be just as many, and the volume and the evidence will be just as great.

In short, the only effect of the settlements has been to reduce the number of parties and cases in the consolidated action. However, as expressly recognized by the district court, ''the actual extent of any lawsuit depends less on the number of parties or cases than on the complexity of the factual matters presented for resolution'' therein. Petition at A-52. Thus, the complexity of the *Colonial* cases has not been substantially reduced by the settlement of the other cases.

[1] In that regard, it should be remembered that the Ninth Circuit not only accepted the district court's characterization of the complicated nature of the action, but also accepted the appellees' (now petitioners') conclusion that the settlements have done little, if anything, to simplify the nature and scope of the complex legal and factual issues presented. Petition at A-11, 39.

[2] Respondent Touche Ross & Co. contends that the three class actions brought by Societe Generale should be considered to have been settled, even though it admits a final agreement has not been signed, nor has the district court approved the ''settlements.'' Memorandum in Opposition of Touche Ross & Co. at 2-3. As such, no basis exists for concluding that those cases have in fact been settled.

[3] *Colonial Ventures, Inc., et al. v. Touche Ross & Co., et al.*, Civil No. 74-436-T (S.D. Cal.); *Colonial Ventures, Inc., et al. v. Brown, Wood, Fuller, Caldwell & Ivey, et al.*, Civil No. 77-454-T (S.D. Cal.).

II.

Only This Court Can Resolve the Inevitable Conflict in the Circuit Courts Concerning Whether the Third Prong of the Ross Test May Be Employed to Resolve the Jury Question.

Respondents correctly note that (i) the court of appeals below was the first circuit court to determine whether a jury demand in a civil case may be stricken solely on the ground of the complexity of the action and (ii) this issue is presently pending before three courts of appeals. Opposition of Charles D. Prutzman, Jr. at 7-8; Opposition Brief of Colonial Growth Shares, Inc. at 2. However, Respondents improperly con-

clude that a consensus among the circuits may be reached that would obviate the need for review by this Court. *Id.* Since the Ninth Circuit refused to use the three-pronged *Ross* test, such a consensus could *never* result. *See* Petition at 12-13.

Respondent' argument that the Ninth Circuit's interpretation of the *Ross* test is consistent with the six circuits that have adopted and used the three-pronged test is wholly inaccurate. In its opinion the Ninth Circuit clearly refused to use three-pronged *Ross* test and in particular the third prong, *viz.*, the "practical abilities and limitations of juries." Petition A-28-33, 46.

Thus, there is now a conflict among the circuits as to whether the three-prong *Ross* test provides the proper standard for determining the right to a jury trial in a civil action. Since, as the Ninth Circuit recognized, the applicability of the *Ross* test is the focal point for determining whether a jury demand may be stricken in complex civil actions (Petition at 12, A-14), a conflict among the courts of appeals will inevitably result when this issue is presented in one of the circuits which, unlike the Ninth Circuit, has adopted and used the *Ross* test. When the issue arises in these six circuits, these courts will be bound by the law of the circuit to apply the *Ross* test. *See, e.g., United States v. Olivares-Vega*, 495 F.2d 827, 829 (2nd Cir.) (circuit court bound unless later case distinguishable or hearing *en banc* held), *cert. den.*, 419 U.S. 1020 (1974); *Timreck v. United States*, 577 F.2d 372, 376 n.15 (6th Cir. 1978) (same), *rev'd on other grounds*, ... U.S. ... , 60 L.Ed.2d 634 (1979); *Id.*, 577 F.2d at 374, n.10 (district court bound).[4]

---

[4] Nor, as Respondents contend, can a consensus regarding the use of the third prong of the *Ross* test develop. Even if the cases pending in the Second and Third Circuits are decided in conformity with the Ninth Circuit, those decisions would conflict with the circuits applying the three-pronged *Ross* test.

Finally, in those circuits that have not decided whether the *Ross* test is applicable, there will be substantial confusion about the proper standard for resolving the question whether there is a right to a jury trial in cases too complex to be understood by a jury. Given this confusion and the inevitable conflict in the circuit courts, it is appropriate for this Court to resolve the question presented at this time.

III.

This Court Has Recognized the Appropriateness of Review of An Interlocutory Order Such As That Now Presented.

Respondent Prutzman suggests that the Court should decline to exercise certiorari because an interlocutory order would be subject to review, and if Petitioners prevail after a jury trial of the claims against them, the constitutional issue with respect to this order would be rendered moot. Opposition Brief of Charles D. Prutzman, Jr. at 4, 6. *See also*, Opposition Brief of Colonial Growth Shares, Inc. 2, 3-4. However, this Court has explicitly recognized that where there is an important issue of law that is fundamental to the further conduct of the case, the case may be reviewed despite its interlocutory status. Thus, in *Beacon Theatres v. Westover*, 359 U.S. 500, 501, 511 (1959), the Court reviewed and reversed an interlocutory order refusing to issue a writ of mandamus that would have required the district court to hold a jury trial as to a certain issue rather than try the case without a jury.

Moreover, if, as Petitioners contend, a jury is incapable of rendering a rational verdict in the present case, the losing party after a jury trial would suffer an irreparable injury to its due process rights. Post trial motions and appeals will not be curative. With a lengthy trial time estimated, fairness to the parties as well as judicial economy demands that the mode of

trial most likely to lead to a just result be chosen now, not in the distant future. The availability of motions, appeal, and retrial is not a meaningful protection in these circumstances. *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972). In addition, any appeal by an aggrieved party would raise the same issue presented herein, and the issue therefore would not be rendered moot.

Conclusion

For the reasons set forth above and in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

MITCHELL L. LATHROP
BRIAN G. GOUCH
LAWRENCE D. STECKMEST
JEFFREY C. BERSIN
MACDONALD, HALSTED
& LAYBOURNE
1200 Wilshire Boulevard
Suite 600
Los Angeles, Calif. 90017
(213) 481-1200

MILTON FREDMAN
FREDMAN, SILVERBERG,
& LEWIS, INC.
3252 Fifth Avenue
San Diego, Calif. 92103
(714) 291-3434

ASA ROUNTREE
STEPHEN C. MUTHER
DEBEVOISE, PLIMPTON,
LYONS & GATES
299 Park Avenue
New York, New York 10017
(212) 752-6400

ROBERT J. BROWN
BONER, BROWN,
DEUTSCH & MANN
Central Federal Tower
225 Broadway, Suite 900
San Diego, Calif. 92101
(714) 233-0600
Of Counsel

Counsel for Petitioners

April 15, 1980